IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1904.

BOARD OF TRADE OF THE CITY OF CHICAGO,
Appellant,
vs.
HAMMOND ELEVATOR COMPANY and the WESTERN UNION TELEGRAPH COMPANY,
Appellees.
No. 215.

Appeal from the Circuit Court of the United States for the Northern District of Illinois.

BRIEF AND ARGUMENT FOR APPELLEE, HAMMOND ELEVATOR COMPANY.

I. STATEMENT.

On July 8, 1903 (Trans. Rec., p. 1) appellant, the Board of Trade of the City of Chicago, an Illinois corporation, filed its bill for injunction in the Circuit Court of the United States for the Northern District of Illinois, Northern Division, on the chancery side thereof, against appellee, the Hammond Elevator Company. The bill of complaint charges that the Hammond Elevator Company is a corporation organized under the laws of the State of Delaware and a citizen of the State of Delaware. This statement, except for the

statement that the Hammond Elevator Company is receiving the quotations of the Chicago Board of Trade "within and without said district" is the only statement contained in the bill of complaint as to the residence, citizenship or place of business of the Hammond Elevator Company. (Trans. of Rec., pp. 2 and 16.)

On the same date a subpoena *ad respondendum* issued in accordance with the prayer of the bill to the Hammond Elevator Company (Trans. of Rec., p. 19), which subpoena was afterward returned by the marshal as served within said district upon the Hammond Elevator Company by delivering a true copy of the same "to Albert N. Babb, agent for the Hammond Elevator Company, at Peoria, Illinois, this 9th day of July, A. D. 1903," and "by reading the same to and within the presence and hearing of John L. Dickes, a member of the firm of Battle & Dickes, agents of the said Company, at the same time delivering a true copy thereof to him on the 8th day of July, A. D. 1903, also by reading the same to and within the presence and hearing of C. S. Battle, a member of the firm of Battle & Dickes, agent of the said company as aforesaid, at the same time delivering a true copy thereof to him on the 9th day of July, A. D. 1903." (Trans. of Rec., pp. 20 and 21.) On July 10, 1903, the Hammond Elevator Company entered its special appearance and, limiting its appearance for that purpose, moved the court in writing to set aside the return of the marshal upon the subpoena on the ground that the return was untrue in fact and insufficient in law, and prayed judgment of the court whether it should be compelled to appear or plead to the bill of complaint for the reason that it had not been served with process and was not compellable to appear or plead to the bill, and had not and did not accept service or waive service of process upon it, and charging that the defendant was not

then and was not at the date of the filing of the bill or at any other time within said district, or within the State of Illinois, and was not found at the date of filing the said bill, or at any time subsequent thereto within said district or within said State of Illinois, and that it is not a resident of the State of Illinois or said district, but is a corporation organized and existing under and by virtue of the laws of the State of Delaware and a resident of said last mentioned state, and that its principal place of business is without said state of Illinois and said district. (Trans. of Rec., pp. 21 and 22.)

In support of this motion the Hammond Elevator Company filed the affidavits of Frank C. Williams and William H. Gostlin, the secretary and president respectively of said company, both of which affidavits set up in substance that the Hammond Elevator Company has its home office at Wilmington, Delaware, and is qualified to and is doing business at Hammond, Indiana, under the statutes of Indiana authorizing foreign corporations to do business in that state, but is not and was not on the 8th day of July, 1903, or at any time since that date, in the State of Illinois or in said district, and that the president or any other officer or agent of the company is not and was not on July 8th, 1903, or at any time subsequent thereto, in the State of Illinois or said district, or transacting business for or representing the company or attending to or engaged in the business of the company in the State of Illinois or said district, and that the company is not and was not on July 8, 1903, or at any time subsequent thereto, authorized or qualified to do business within the State of Illinois in accordance with the statutes of Illinois. (Trans. of Rec., pp. 23 to 25.)

On October 5, 1903, over the objection of appellee, the Hammond Elevator Company, its motion to quash was referred to William M. Booth, one of the Masters of the court, to take evidence of the parties upon said motion and

report the same with his conclusions of law. (Trans. of Rec., p. 26.) Upon this reference testimony was taken from time to time thereafter before Mr. Booth, and on December 15, 1903, the Master filed his report upon said reference, in the Circuit Court (Trans. of Rec., p. 217), recommending that the motion of the defendant, the Hammond Elevator Company, to quash the service of process be sustained. (Trans. of Rec., p. 227.)

On the same date, by leave of court, the complainant amended its bill by making the Western Union Telegraph Company a party defendant, and filed a supplemental bill. (Trans. of Rec., pp. 227 to 230.)

On December 21, 1903, complainants', appellants', exceptions to the Master's report were overruled and the Master's report approved and confirmed, and the motion of defendant, appellee, Hammond Elevator Company, to quash the service of process, granted.

Thereupon counsel for complainant stated in open court that the complainant was unable to make any other or different service upon the defendant, the Hammond Elevator Company, within the district, and it was ordered that the amended and supplemental bills be dismissed as to the Hammond Elevator Company for want of prosecution by the complainant. (Trans. of Rec., p. 243.)

On February 23, upon a motion of the complainant for a decree *pro confesso* against the Western Union Telegraph Company, the amended and supplemental bills were dismissed as to the defendant, Western Union Telegraph Company, at complainants' costs, "without prejudice to complainants' right to institute such other suits as it may deem advisable, touching the matters in said bills contained." This order recites that it appears to the court that it has not acquired and can not acquire jurisdiction of the person of the defendant, Ham-

mond Elevator Company, and that it is not practicable to proceed in the case without the presence of the Hammond Elevator Company. (Trans. of Rec., p. 244.)

On February 26, 1904, the complainant filed its petition for appeal in the Circuit Court, which is in part as follows:

> "The above named complainant, conceiving itself to be aggrieved by the decision of this court, that it was without jurisdiction of the person of the defendant, Hammond Elevator Company, and by the orders and decrees entered by this court in pursuance of such decision, on the 21st day of September, 1903, and the 23d day of February, 1904, does hereby appeal from said final decree of February 23, 1904." (Trans. of Rec., pp. 244 and 245.)

The assignment of errors in no way complains of the entry of the order of February 23, 1904, which is the order appealed from. (Trans. of Rec., pp. 245 to 247.)

The questions passed upon under the reference of the motion to quash, as most succinctly stated by the Master, and merely elaborated in the certificate to this honorable court by the Circuit Court (Trans. of Rec., p. 248.) were:

> First, was appellee, the Hammond Elevator Company, at the time of the alleged service of process, doing business in the Northern District of Illinois so as to render it subject to service of process in an action in the United States Court for that district?
>
> Second, were the correspondents, Babb and Battle & Dickes, who were served as agents of appellee, the Hammond Elevator Company, in reality such agents that service upon them was equivalent to service upon the Hammond Elevator Company? (Trans. of Rec., p. 218.)

Upon the reference to the Master, the late William M. Booth, this case received the careful and exhaustive ex-

amination and consideration which was the characteristic of his mind and methods of work, and his orderly and concise report of facts and conclusions is one of the last monuments to his memory, which he left to his associates at the Chicago Bar. It would be impossible for counsel to place before this court the facts developed upon the hearing before the Master more succinctly and clearly than is done by Mr. Booth in this report, and we therefore take the liberty of quoting our statement of facts as to the relations of Battle & Dickes and Babb, and appellee, the Hammond Elevator Company, from the Master's report, inserting the pages of the transcript of record where the evidence appears supporting each finding of the Master:

"III."

"The defendant at the time of and for about six months prior to the service of the subpoena herein, maintained a place of business at Hammond, Indiana, and had under leases from the Western Union Telegraph Company the exclusive use (from shortly before nine a. m. to shortly after two p. m. of each business day) of certain telegraph wires running from its said place of business to certain offices in different cities in Illinois" (and in other States, Trans. of Rec., pp. 37 and 38), "including an office in Peoria, in the possession and control of the A. H. Babb mentioned in the marshal's returned subpoena herein, and another in Aurora, in the possession and control of the firm of Battle & Dickes, also mentioned in the marshal's return. (Trans. of Rec., p. 37.) In the written and printed leases of these wires signed by defendant, the offices of these 'correspondents' are designated in the printed portion of said leases as offices of the defendant. Said leases are regular printed forms prepared and used by the Western Union Telegraph Company. The cost of rental of these wires was paid to the said telegraph company by the defendant." (Trans. of Rec., p. 205.)

"IV."

"Over these wires the defendant causes to be transmitted (between nine a. m. and two p. m. of each business day) continuous market quotations of the New York Stock Exchange to said Battle & Dickes and said Babb, who post these quotations upon blackboards in their respective offices. In the vernacular of the business, Battle & Dickes and Babb are called 'correspondents.' Customers resorting to the correspondent's office and desiring to trade, give a verbal or written order to buy or sell grain or stock, which is transmitted by the correspondent in his own name over the private wire running into said office as aforesaid by the telegraph operator therein, to defendant's office at Hammond as an offer by the correspondent to buy from or sell to the defendant. These orders are for lots of ten shares of stock, or multiples thereof, and lots of one thousand bushels of grain, and mutiples thereof. Sometimes the price is mentioned by the customer and sometimes it is not. In the latter case it is understood that the trade is to be made at whatever the market is. (Trans. of Rec., pp. 63 to 70, 82 to 84.) When the order is given the correspondent exacts from the customer a margin, unless the customer already has moneys on deposit with the correspondent. In some cases when the customer is of known financial responsibility, the correspondent does not immediately call for any money on the trade." (Trans. of Rec., pp. 84-85, 125-127.)

The amount of such margin exacted is fixed by the correspondent, and varies somewhat according to the condition of the market. In the case of the correspondent Babb, the margin exacted from the customer on stocks is two dollars per share."

"V."

"The telegraph operator in sending each order gives it a number, by which the trade, if made, is subsequently designated and known, on all statements and accounts passing between the defendant and the correspondent,

and also on the books of the correspondent. The trade is also designated and identified by this number in all telegrams passing between the correspondent and the defendant respecting it. To these telegraphic orders telegraphic replies are sent back (when the defendant accepts the trade) by the defendant, over this same wire, notifying the correspondent that defendant has accepted the trade, giving the number of the trade and the price at which the trade is accepted. (Trans. of Rec., pp. 43, 65-74, 83-85, 87, 89-90, 118-124, 129-130, 132-137, 135.) Upon the receipt of the telegram, the correspondent notifies the customer of the acceptance of the order. If the defendant refuses to accept the trade, as it frequently does, the correspondent is so informed over the wire. (Trans. of Rec., pp. 41, 67-68, 83-84, 106-108, 120, 122-123.) The defendant has no dealings whatever with the customer and is not informed of his name, and has no way of identifying him. It knows its transactions as 'trades' and by number only, and has no dealings except with the correspondent."

"As soon as the telegraphic order is received and accepted by the defendant, a fixed amount of margin is charged up by it on its books against the correspondent, viz.: ten dollars per ten shares of stock, and ten dollars per 1,000 bushels of grain." (Trans. of Rec., p. 48.)

"V I."

"The correspondent charges his customer a commission of one-eighth of a cent a bushel on grain (Trans. of Rec., p. 85), and in a stock deal of twenty-five cents a share, or $2.50 on each ten shares dealt in (Trans. of Rec., p. 131). The correspondents, Battle & Dickes, do not do any grain business, and the correspondent Babb does very little in that commodity. (Trans. of Rec., pp. 115, 150.)

"The defendant keeps a regular book account with its correspondent, and in addition to charging up the margin against him as above stated, it makes an arbitrary charge against him on each deal which is called on its state-

ments rendered to correspondents 'wire service,' meaning a charge made for the use of the private wire. (Trans. of Rec., p. 51.) This charge is 50 cents on each ten shares of stock. On the books of Battle & Dickes this item is entered as 'charge.'

"In its transactions with Babb, the defendant makes no charge for wire service on transactions in grain, but only on stock transactions. (Trans. of Rec., p. 49.) In addition to the above charge the defendant charges the correspondent fifty dollars per month for the stock quotations and market 'gossip' which are sent daily over the private wire in question. (Trans. of Rec., p. 87.)

"VII."

"Each day the defendant enters upon a statement (see Complainant's Exhibit 4 and Defendant's Exhibit 1) which it that day sends to the correspondent, each trade it has that day accepted from such correspondent. (Trans. of Rec., pp. 43, 73.) This open trade is entered on the debit side of the statement by its number, and a sum as margin, equal to $10 on each 1,000 bushels of grain, and $10 on each ten shares of stock, is charged against the correspondent on such trade. (Trans. of Rec., pp. 89, 135, 178, 181.) Upon the credit side of these statements any transactions closed that day are entered, and the statement is mailed so that the correspondent gets it next morning. (Trans. of Rec., p. 73.) If it shows a debit balance, derived in the manner hereinafter explained, the correspondent (unless the amount is small, in which case it is allowed to stand) (Trans. of Rec., p. 98) deposits the approximate amount in round figures in a bank in his city (Aurora, in the case of Battle & Dickes, and Peoria in the case of Babb) to the credit of the defendant, except as stated below. The defendant thus maintains an active bank account in each of said banks. For two or three months last past said deposits have been made to the credit of the First National Bank of Hammond, Indiana, but up to and including July 10, 1903, they were made to the credit

of the defendant as above stated. If there are closed trades upon a statement of any day, and this results in a balance to the credit of the correspondent instead of a debit, a check of defendant, payable to the correspondent, and usually drawn upon the same local bank where the deposits are made to defendant's credit as aforesaid, accompanies the statement. (*Trans. of Rec., p. 100.*) Thus as a general thing, the balance due on each day's transactions, as between the defendant and the correspondent, is settled the next day, or approximately settled. (Trans. of Rec., p. 99.)

"VIII."

"These statements are on regular printed blanks of the defendant, which contain on the front page among other printed matter including the defendant's corporate name, the statement, 'We have no agents.' (Trans. of Rec., p. 96, *et seq.*)

"The back of said statement is practically filled with printed matter, of which the following is a portion:

"'FORM OF AGREEMENT ASSENTED TO BY ALL WHO DEAL WITH THE HAMMOND ELEVATOR COMPANY (INCORPORATED).

"'In consideration of the Hammond Elevator Company, Incorporated, a corporation doing business in the City of Hammond, County of Lake, State of Indiana, consenting through its manager to deal and to contract with me as principal, in buying and selling commodities, I hereby agree:

"'First. In all cases where I shall purchase from or contract to purchase from or shall sell or contract to sell to said Hammand Elevator Company any commodity, I will receive and pay for the commodity purchased or contracted to be purchased from it, and will deliver the commodity sold or contracted to be sold to it.'

"(Here follow certain provisions not deemed material, but which may be seen upon the back of Complainant's Exhibit No. 2.)

"'Seventh. That I am not and will not represent myself as being agent for said Hammond Elevator Company, but will represent that I have no authority to act for it. It is not responsable for anything that may be done by me.'"

"IX."

"On all trades the defendant looks only to the correspondent. In case of a loss if the correspondent has failed to secure sufficient margins from his customer and is unable to collect the amount from him, the correspondent must stand whatever loss is incurred. The defendant charges up and retains the amount of its charge for wire service, in any event, as well as all losses of the correspondent on trades. (Trans. of Rec., pp. 157-158, 195.)

"X."

"Each $10 deposited margins each 1,000 bushels of grain seven-eighths of a cent only as between the correspondent and his customer, instead of a full cent, the correspondent's commission aforesaid being deducted therefrom. (Trans. of Rec., p. 178.) For the same reason each $10 deposited margins each ten shares of stock only three-fourths of a dollar per share, as between the correspondent and his customer. But as between the correspondent and the defendant each $10 charged up against the correspondent margins the trade on 1,000 bushels of grain a full cent, and a stock trade one dollar per share. (Trans. of Rec., p. 183.) To illustrate: If the correspondent accepts an order for grain from a customer and fills the order by purchasing the grain from the defendant at 70 cents, the exhaust point on that trade as between the correspondent and his customer is 69⅛ cents, and if the market reaches the latter point the correspondent directs the defendant to close the trade at that point, or else he requires the customer to put up additional margins. (Trans. of Rec., p. 183.)

"But, if the correspondent gives no order to close

the trade it is not closed by the defendant at 69⅛, nor at 69, but when it reaches the latter point an additional margin is charged up against the correspondent, and this is continued until the correspondent orders the trade closed. (Trans. of Rec., pp. 70, 84, 91, 93, 129, 136, 179, 183-184, 190-193.)

"XI."

"A trade when once opened is closed either upon an order given by the customer to the correspondent and by the latter transmitted over the wire as his own order, and accepted by the return message, as in the opening order, or upon a similar order given by the correspondent because the customer fails to put up a further margin when required. In either case the closing order is sent by the correspondent in his own name. When closed, the trade is entered upon the aforesaid daily statement sent by the defendant, upon the credit side thereof, by number, and in such a way as to show a credit made up of all the margins previously charged against the trade, plus the profits, if any, on the trade, or minus the loss, if the trade is closed out at a loss. There are no entries in such statement under the head of commissions, and the correspondent's charges of that character are not shown separately from the net result of each trade. On the debit side is entered in a lump sum the defendant's charge of 50 cents of each 10 shares of stock traded in on that day. This entry is made under the letters 'W. S.' standing for wire service. No statements are rendered by the correspondent to the defendant, and he keeps no book account with it."

"The difference between the sum of these credit items on the statement and the sum of the debit items (margins and remargins charged, and said charge for wire service) constitutes the debit or credit balance, settled by deposit or check, as above stated. If the result of a particular trade is a profit to the customer, the correspondent pays the profit (plus the margins deposited) less the commission, to the customer, or retains it as a

credit balance of the customer for further transactions. If the trade is a losing one, and has not been adequately margined by the customer, the correspondent collects from the customer if he can. Whether he does or not, the defendant does not lose, since, as above stated, the defendant charges up all losses against the correspondent, leaving the latter to deal with his customer as he sees fit.

"XII."

"Summarized, the manner of conducting the business is this:

"The defendant, to enable its correspondents to gather business consisting of trades in grains or stocks, from persons living in the cities where these correspondents are located, provides and maintains private wires running from its office in Hammond, to the office of the correspondent. Over this wire it sends quotations, by the display of which on a blackboard, the correspondent encourages customers to trade. The correspondent receives numerous orders daily from those frequenting his office, and sends them in his own name over this leased wire to the defendant, which accepts them when the state of the market justifies, by return message over the same wire, the contents of which are communicated by the correspondent to the customer. The individuality of each trade is preserved throughout by a number given to it by the correspondent's operator at the outset.

"Except in the case of a losing trade, where he has failed to protect himself by securing adequate margins from his customer, and is unable to collect from the latter the amount of loss, the correspondent participates neither in the loss nor the profits incurred in a trade.

"He derives as his compensation a fixed sum, whether the transaction results in a profit to defendant or to the customer. Through daily statements and daily settlements of the balance shown thereby, the correspondent remits to the defendant, through its local bank,

whatever amounts are shown to be due from him to the defendant for margins, wire service, etc.

"In his dealings with the customer, the correspondent exacts such margins as he sees fit, in cash, the amount depending somewhat on the course of the market, or, in some cases, charges such margins to the customer, when he has an account with him. In settling with the customer, if the trade shows a profit, the correspondent pays back to the customer his deposit plus the profit, deducting only his commissions of $1.25 per 1,000 bushels of grain, and $2.50 per ten shares of stock. If the trade is a losing one and has been closed so as to exhaust the margin, the customer receives back nothing and has nothing further to pay. If a loss has been incurred greater than the margin, the correspondent calls upon the customer to make the loss good; if he does not do so the loss is the correspondent's.

"The correspondent as a rule orders the defendant to close each trade at such a point as will leave unexhausted sufficient of the margins which it has charged against the correspondent to cover the correspondent's commissions of $1.25 per 1,000 bushels of grain and $2.50 per ten shares of stock. (Trans. of Rec., pp. 70, 84, 91, 93, 129, 136, 179, 183-184, 190-193.) This leaves a credit for those amounts to the correspondent on each transaction. As against him is entered the defendant's charge for wire service, of 50 cents per ten shares of stock, so that in fact the net amount ultimately realized by the correspondent is $1.25 per 1,000 bushels of grain, and $2 per ten shares of stock. But as above stated, the correspondents Battle & Dickes do not trade in grain.

"XIII."

"* * * In this case the evidence shows a formal contract between the corporation and the alleged agent to the effect that the parties shall deal as principals and that the relation of principal and agent shall neither exist or be held out to exist. (Trans. of Rec., 156, 158 and 196, *et seq.*) There is, moreover, no evidence

that the correspondents Babb or Battle & Dickes have ever claimed or represented themselves to be agents of the defendant.

"XIV."

"If, therefore, such agency does exist in the present case, it must be as a matter of law, and contrary to the expressed intention and contract of the parties * * *

"XV."

"* * * The customer knows that the correspondent is not selling stocks to him or buying stocks from him, but is merely taking his order for transmission. Hence the correspondent's charge to the customer for his services is properly called a commission. The customer does not direct the correspondent from whom he is to purchase, or to whom he is to sell, and the latter is at liberty to purchase from or sell to the defendant, or elsewhere, as he chooses. In point of fact, perhaps because of the facilities offered by the private wire, he almost invariably does purchase from or sell to the defendant.

"But the defendant knows nothing of the customer. All its orders come from the correspondent in his own name. All funds received by it are sent to it, through the bank, by the correspondent. All its charges are made against, and all its credits entered in favor of the correspondent. Indeed, so far as the evidence shows, there is no ground for claiming that the defendant knows that the correspondent has any customers, or that he is not dealing solely on his own account. * * * (Trans. of Rec., pp. 52, 53.)

"XVII."

"* * * The correspondent has no authority to bind the defendant, or make trades for it.

"He cannot accept a customer's order for the defendant, but must send it over the wire as an offer to buy or sell. (Trans. of Rec., pp. 67, 68, 72, 73, 83, 84,

122.) Sometimes the defendant refuses to accept it. If it does accept it, the correspondent is so informed by wire, and communicates the fact to the customer. Complainant's counsel argues from this that the trade is made in Illinois, but the contrary appears to the Master to be the fact. The offer is made at Hammond; it is accepted or refused at Hammond; if accepted, the margin required is charged up at Hammond against the correspondent; the profits or losses are made and figured at Hammond; the defendant's charge for wire service is made and entered at Hammond; and the daily statement is made at Hammond and forwarded by mail to the correspondent. If it shows a balance in his favor it is accompanied by a check which is drawn at Hammond, usually on the local bank in the correspondent's city. If it shows a balance against him, he deposits the amount due in the same local bank to the defendant's credit, or to the credit of the Hammond bank. But in doing this he is not acting as the defendant's agent, but merely on his own behalf, paying his own indebtedness through the channel selected by the creditor. * * *

"XVIII."

"* * * The statement in the wire leases that the wires run from one office of the defendant to another office of the defendant, * * * is a mere printed form prepared and used by the telegraph company, and not such a paper as can properly be considered an admission on behalf of the defendant of which the complainant can take advantage." (Trans. of Rec., p. 214) Moreover these leases were never offered in evidence. (Trans. of Rec., p. 187, *et seq.*)

II. BRIEF OF ARGUMENT.

(1) THE ORDER OF FEBRUARY 23, 1904, DISMISSING THE BILL AS TO THE WESTERN UNION TELEGRAPH COMPANY WITHOUT PREJUDICE IS NOT SUCH A FINAL ORDER AS TO BE REVIEWABLE UPON APPEAL BY THIS COURT.

Davis v. *Geisler*, 162 U. S., 290; 40 L. Ed., 972.
Fowler v. *Hamill*, 139, U. S., 549; 35 L. Ed., 266.

(2) THE APPEAL FROM THE ORDER OF FEBRUARY 23, 1904, DISMISSING THE BILL AS TO THE WESTERN UNION TELEGRAPH COMPANY, WHEN THE APPELLEE, HAMMOND ELEVATOR COMPANY, WAS OUT OF COURT, DOES NOT IN ANY WAY INVOLVE OR AUTHORIZE A REVIEW BY THIS COURT OF THE ORDER OF FEBRUARY 23, 1904, DISMISSING THE BILL AS TO APPELLEE, HAMMOND ELEVATOR COMPANY, AND THIS NOTWITHSTANDING THE CERTIFICATE OF THE TRIAL JUDGE.

(3) IN THE ABSENCE OF ANY SHOWING IN THE RECORD OTHER THAN THE STATEMENT OF COMPLAINANT IN OPEN COURT RECITED IN THE ORDER OF DISMISSAL OF THE BILL AS TO THE HAMMOND ELEVATOR COMPANY, THE ORDER OF DECEMBER 21, 1903, WAS A VOLUNTARY NON-SUIT AND IS NOT REVIEWABLE UPON APPEAL.

(4) UNDER THE LAW AND THE EVIDENCE THE COURT PROPERLY ADJUDGED THE SERVICE OF SUBPOENAS HEREIN INSUFFICIENT TO

CONFER JURISDICTION OF APPELLEE, THE HAMMOND ELEVATOR COMPANY, AND THEREFORE GRANTED APPELLEE, HAMMOND ELEVATOR COMPANY'S, MOTION TO QUASH SERVICE OF PROCESS HEREIN.

ILLINOIS STATUTES.

"Foreign corporations, and the officers and agents thereof, doing business in this State, shall be subjected to all the liabilities, restrictions and duties that are or may be imposed upon corporations of like character organized under the general laws of this State, and shall have no other or greater powers." * * *

Hurd's Rev. Statutes of Ill., 1903, Chap. 32, p. 475, Sec. 26; in force July 1, 1872.

"An incorporated company may be served with process by leaving a copy thereof with its president if he can be found in the county in which the suit is brought, if he shall not be found in the county, then by leaving a copy of the process with any clerk, secretary, superintendent, general agent, cashier, principal, director, engineer, conductor, station agent or any agent of said company found in the county,* and in case the proper officer shall make return upon such process that he cannot in his county find any clerk, secretary, superintendent, general agent, cashier, principal, director, engineer, conductor, station agent or any other agent of said company, then such company may be notified by publication and mail in like manner and with like effect, as is provided in Sections 12 and 13 of an Act entitled 'An Act to regulate the practice in courts of chancery,' approved March 15, 1872."

Hurd's R. S. of Ill., 1903, Chapter 110, Sec. 5, p. 1400; in force Mar. 15, 1872, and as amended in force July 1, 1877.

"Section 4 of Act of 1845 provided for service on president, principal, clerk, cashier or secretary, at his office (with a proviso saving special modes provided by special acts, for suing corporations). It reads, 'executed on the president thereof, or served by leaving a copy of summons with,' etc.

"L. 1853, p. 258, Section 1, February 8, extends list of such officers to include any clerk, engineer, conductor or agent, and omitted the proviso saving special methods of service.

"Section 4 of Act of 1872 was identical with portion of text preceding asterisk (*).

"L. 1877, p. 146, May 29, July 1, adds portion after asterisk (*)."

Vol. 3, Starr & Curtis' Annotated Ill. Statutes, Chap. 110, Sec. 5, p. 2986.

"Every corporation for pecuniary profit formed in any other State, territory or country, before it shall be authorized or permitted to transact business in this State, or to continue business therein, if already established, shall designate some person as its agent or representative in this State on whom service of legal process may be had if desired." * * *

Hurd's R. S. of Ill., 1903, Chap. 32, Sec. 67 B, p. 486; in force July 1, 1897, and as amended July 1, 1899.

"* * * Such corporation, by its president, secretary or any officer thereof, shall make and forward to the Secretary of State, * * * a statement duly sworn to, * * * and such statement shall further show the name and address of the agent or representative of said corporation in this State." * * *

Id., Sec. 67 C, pp. 486-487.

Mineral Point R. R. Co. v. *Keep*, 22 Ill., 16.

Chicago & Rock Island Ry. Co. v. *Fell*, 22 Ill., 337.

Peoria Insurance Company v. *Warner*, 28 Ill., 433.

Union Pacific Ry. Co. v. *Miller*, 87 Ill., 45.

Midland Ry. Co. v. *McDermid*, 91 Ill., 170.

Hannibal & St. Joe R. R. Co. v. *Crane*, 102 Ill., 349.

Italian-Swiss Ag. Colony Co. v. *Pease*, 194 Ill., 98, at p. 106.

March-Davis Cycle Mfg. Co. v. *Strowbridge Lith. Co.*, 79 Ill. App., 683.

Havens & Geddes Co. v. *Diamond et al.*, 93 Ill. App., 557.

Note also as involving the Ill. Stats.:

Wall v. *Chesapeake C. & O. R. R. Co.*, 95 Fed., 398.

And as involving similar statutes:

Blake v. *R. R. Co.*, 21 Fed., 529.

(A) Under the averments, if true, of the motion to quash, the Circuit Court had no jurisdiction of appellee, Hammond Elevator Company, by virtue of the alleged service of process.

Federal Courts in common law actions follow the statutes in respective states in regard to service on corporations by the force of statute providing for conformity with the state practice in actions at law.

2 Foster's Fed. Prac., 3rd Ed., pp. 806, 810, 811.

The practice in equity cases is not dictated by statute, but

in such cases the state practice merely furnishes a code which the Federal courts are apt to follow.

1 Foster's Fed. Prac., 3rd Ed., p. 254.

The state statute must be reasonable and the service provided for be only upon such agents as may properly be deemed representatives of the foreign corporations.

Id., pp. 255, 256, *et seq.*

St. Louis Wire Mill Co. v. *Consolidated Barb Wire Co.*, 32 Fed., 802.

Good Hope Co. v. *Railway Barbed Fencing Co.*, 22 Fed., 635.

Goldey v. *Morning News*, 156 U. S., 518; 39 L. Ed., 517.

D'Arcey v. *Ketchum*, 11 How., 165; 13 L. Ed., 648.

Three conditions must occur. First, the corporation must be carrying on its business in such foreign state or district. Second, such business must be transacted or managed by some agent or officer appointed by and representing the corporation in such state. Third, there must be some local law making such corporation amenable to suit there as a condition expressed or implied of doing business in the state.

1 Foster's Fed. Prac., 3rd Ed., pp. 257 and 258.

U. S. v. *American Bell Telephone Co.*, 28 Fed., 17-35.

Midland Ry. Co. v. *McDermid*, 91 Ill., 173.

And for general discussion of principles involved see

St. Clair v. *Cox*, 106 U. S., 350, 22 L. Ed., 222.

(B) The averments of the motion to quash are, under the evidence, true. The transactions shown by the evidence do not show a doing of business by the Hammond Elevator Company within the state of Illinois or said

district, and the relations between Battle & Dickes and Babb and the Hammond Elevator Company do not amount, in law, to such an agency as is contemplated by law for the service of process upon a non-resident foreign corporation.

St. Clair v. *Cox*, 106 U. S., 350; 22 L. Ed., 222.

Goodhope v. *Railway Barbed Fencing Co.*, 22 Fed., 635.

U. S. v. *American Bell Telephone Co.*, 29 Fed., 17, at p. 40.

St. Louis Wire Mill Co. v. *Consolidated Barbed Wire Co.*, 32 Fed., 802.

Maxwell v. *A. T. & S. F. R. Co.*, 34 Fed., 286.

N. K. Fairbanks Co. v. *Cincinnati, N. O. & T. R. Ry. Co.*, 54 Fed., 420.

Evansville Courier v. *United Press*, 74 Fed., 918.

Wall v. *C. & O. R. R. Co.*, 95 Fed., 398.

Doe v. *Springfield Boiler & Mfg. Co.*, 104 Fed., 684.

Municipal Telegraph & Stock Co. v. *Ward*, 133 Fed., 70.

(C) The ultimate findings of the Master from the evidentiary facts.

Municipal Telegraph & Stock Co. v. *Ward, Collector*, 133 Fed., 70, at p. 72.

III. ARGUMENT.

(4A) It will hardly be contended that, under the averments, if true, of the motion to quash, the Circuit Court had any jurisdiction of appellee, the Hammond Elevator Company, by virtue of the alleged service of process upon it.

It must be further conceded by counsel for appellant that the state statute must be reasonable, and the service provided for be only upon such agents as may properly be deemed representatives of the foreign corporation. It is in this connection, however, that we have directed the attention of the court to the statutory provisions of Illinois touching the service of process upon foreign corporations, and we shall, therefore, here review briefly the history of the statutory enactments in the State of Illinois on this subject.

The liability of a foreign corporation to service of process in a state other than the state of its domicile, arises solely out of statutory enactments defining the terms upon which a foreign corporation may do business within a given state, and is based upon the theory that, given the statutory provisions, the foreign corporation, by transacting business within the state, impliedly consents to subject itself to the jurisdiction of the state by service of process upon its local representatives.

Prior to 1897, the only statutory provision in the State of Illinois as to the terms upon which a foreign corporation could do business in the state, was the statute providing that the foreign corporation, its officers and agents, doing business in the State of Illinois, should be subject to all the liabilities, restrictions and duties which are and may be imposed upon domestic corporations.

Section 26, page 475, Chapter 32, Hurd's Revised Statutes of Illinois, 1903.

This statute is still in force, but, in addition to it, the statute of 1897 provides for the appointment of an agent by the foreign corporation on whom service of process may be had.

Hurd's Revised Statutes of Illinois, Section 67b, 67c, page 486, Chapter 32.

The statute of 1897 contained a proviso that the act should not apply to drummers, soliciting agents, etc., of foreign corporations. As amended in 1899, the statute did not contain this proviso. It has been held, however, that the omission of this proviso in the act of 1899 has no effect upon the meaning of the statute, but that, on the contrary, it is to be presumed that the legislature omitted the proviso because unnecessary.

Havens & Geddes Co. v. *Diamond*, 93 Ill. App., 557, at p. 568.

March-Davis Cycle Mfg. Co. v. *Strobridge Lith. Co.*, 79 Ill. App., 683.

Under all of these statutes, that of 1872, that of 1897 and that of 1899, it is necessary, in order to determine the liability of a foreign corporation to suit in Illinois by service of process upon a local representative, to turn to the Illinois statute fixing the liability of domestic corporations to suits upon such service. The foreign corporation doing business in the State of Illinois will be subject to suit in Illinois upon service upon it in accordance with the provisions of the statute as to service upon domestic corporations in so far, and only in so far, as the statutory provision for service upon a domestic corporation is reasonable, when applied to foreign corporations; that is, when the statute, in its application to foreign corporations and their representatives, is justifiable and fair, under the principles of law and justice upon which a foreign corporation may be

subjected to suit in a state other than the state of its domicil.

The earliest statutory enactment in Illinois providing for service of process upon a domestic corporation was the Act of 1845, which provided for service upon the president, clerk, cashier or secretary, at his office.

Starr & Curtis's Annotated Statutes of Illinois, 1896, Vol. 3, Chap. 110, page 2986, Section 55, notes.

By later statute, in 1853, provision was made for service upon the president, if he resided in the county, or if absent, by leaving a copy of process with any clerk, secretary, cashier, engineer, conductor, or any agent of the company found in the county.

Starr & Curtis's Annotated Statutes of Illinois, Vol. 3, Chap. 110, Section 5, page 2986, notes.

It is to be noted that, as to the clerk, the provisions of the statute of 1853 say, "any clerk"; as to the agent, "any agent." The language of the statute may be definitely referred to in the case of *Peoria Ins. Co.* v. *Warner*, 28 Ill., 429, where it is set out.

Subsequently the statutes of 1872 and 1877 were enacted. The statute of 1877 is identical with that of 1872, except that the former provides for service by advertising, so the two statutes will be considered together.

These statutes, that is, the statutes of 1872 and 1877, provide for service of process upon any clerk, secretary, superintendent, general agent, cashier, principal, director, engineer, conductor, station agent, or any agent.

The elementary rule of statutory construction, that general terms following specific terms will be limited by the specific terms, requires no citation of authorities. The pro-

vision of the statute of 1877, which is the statute now obtaining, for service upon any clerk, is inherited from the statute of 1845, providing for service upon officials at the office of the corporation, and clearly contemplates a clerk in charge of such office. It certainly meant something different from an agent, and, in any event, is clearly inapplicable, under the facts, to the service the legality of which is here in dispute. The term "or any agent," if the amendment to the statute of 1853, inserting the term "general agent," is to be given any effect whatever, must mean any agent of the same general class as the secretary, superintendent, general agent, cashier, principal, or director. If the term "general agent" does not restrict the meaning of the term, "any agent," then the amendment to the statute by the Acts of 1872 and 1877 are of no effect whatever.

In dwelling upon the statutory provisions of Illinois and the proper interpretation to be given those provisions, we in no way recede from our position taken in the brief above and mentioned later in the argument, that the Federal courts will enforce a local statute, in so far as the local statute contemplates service of process upon a foreign corporation, only when such corporation is carrying on its business in the state by and through some agent or officer appointed by and representing the corporation.

(4B) The averments of the motion to quash are, under the evidence true; the transactions shown by the evidence do not show a doing of business by the Hammond Elevator Company within the State of Illinois or said district, and the relation between Battle & Dickes and Babb and the Hammond Elevator Company do not amount, in law, to such an agency as is contemplated by law for the service of process upon a non-resident foreign corporation.

As pointed out in the opening statement, *supra*, it appears

on the face of the bill that the Hammond Elevator Company is a corporation organized under the laws of the State of Delaware, and a citizen of the State of Delaware. The only other statement contained in the bill of complaint as to the residence, citizenship, or place of business of appellee, the Hammond Elevator Company, is the allegation that the Hammond Elevator Company is receiving quotations of the Chicago Board of Trade within and without said district. Notwithstanding the fact that, in the proceedings before the Master, upon the reference of the motion to quash, the evidence in support of the motion to quash was first introduced, the case was disposed of by the Master without any mention or discussion of the question of burden of proof, and we insist that, in a proceeding involving the jurisdiction of the court, especially in the absence of any allegations in the bill of complaint upon which to base the service of process within the Northern District of Illinois, it is for the appellant to establish, from the evidence, the jurisdictional facts in support of the alleged service of process. In fact, however, the evidence affirmatively shows the absence of the jurisdictional facts.

The Master, in his report, states that "each party to this case accuses the other of being a 'bucket shop,'" and further states, that it appears to the Master to be utterly immaterial whether either or both are gambling concerns or corporations engaged in legitimate business. Preparing our brief for this Honorable Court, in large part, in advance, and before seeing the brief for appellant, we can anticipate appellant's argument only from the argument made on behalf of the Board of Trade before the Master, and before the trial court. We may err in our anticipation as to the line of argument of counsel for appellant in this court, but feel that the statement by the Master as to these mutual accusations warrants

an explanation on our part, especially as, in event of counsel's following the same line of argument that he did below, his charge against appellee, the Hammond Elevator Company, is the basis of and characterizes his entire line of argument.

Counsel's first step was, and we believe will be here, to condemn appellee, the Hammond Elevator Company, as one of a class of concerns which he dubs "bucket shops"; to then refer to reports, wherever he can find a report, holding that a concern was engaged in a gambling or bucket shop transaction, and draw an analogy between such concerns and this defendant company, on the assumption that appellee is, as he declares, a bucket shop.

The next step, still upon the assumption that appellee, the Hammond Elevator Company, is a bucket shop, is that, being a bucket shop, the plain terms of its relations with Babb and Battle & Dickes are to be disregarded, and the court is to determine what the relations of appellee, the Hammond Elevator Company, Battle & Dickes and Babb are, on the assumption that they are not what they purport to be. We apprehend that this court will not arbitrarily disregard the express contractual relations of the Hammond Elevator Company and Battle & Dickes and Babb, and indulge in speculation upon that assumption as to what the actual relations of the parties are. In the absence of some well founded reason to the contrary, this court is precluded from implying the existence of relations between the parties other than and contrary to the express terms of their agreements. On the other hand, we do not contend that, merely because the Hammond Elevator Company announces that it has no agents, it follows conclusively that they have none, or that they have not been doing business in Illinois through resident agents; but counsel for appellant would have the

court find that, because the Hammond Elevator Company announces that it has no agents, every one is its agent.

The relationship between the parties, to which Babb and Battle & Dickes testified, and which the Master finds is the actual relationship between these so-called correspondents and appellee, the Hammond Elevator Company, namely, that Babb, for instance, takes an order from a customer to buy or sell a particular product, and thereupon buys or sells, or endeavors to buy or sell, this product for his customer, from or to the Hammond Elevator Company, is not a legally impossible relationship. It is a perfectly conceivable legal transaction. There is nothing legally inconceivable or improper in the Hammond Elevator Company's charging Babb, aside from or beyond the market price on the commodity, for the use of the wire furnished by the Hammond Elevator Company, on the basis of the amount of business which Babb does over that wire. If, as counsel contend, Babb is the agent of the defendant company, what difference in the relations of the parties from those shown by the evidence in this case, would there be if Babb were not the agent of the defendant company? If the parties, desiring to do business with each other in the manner in which the evidence shows they do do business, wish to do so without creating Babb the agent of the Hammond Elevator Company, how then shall they do so? If they have not, by their contract and dealings, as shown by the evidence, arrived at this, their avowed desideratum, how can they? The transaction of business, as these parties had transacted business, without creating Babb or Battle & Dickes the agents of the defendant company is perfectly feasible in law. The parties desired to transact this business in this way without creating Babb and Battle & Dickes the agents of the Hammond Elevator Company. In what manner, or for what reason, have they failed to accomplish their design?

Counsel for appellant will admit that the actual relationship between these parties, as disclosed by their testimony and the provisions on the back of each printed statement, is a relationship to which the parties are endeavoring, with all their legal strength and acumen, to attain. If appellee, the Hammond Elevator Company, wishes to enter into an agreement with Mr. Babb, by which they induce Babb to give them business, by putting in a wire, for which the Hammond Elevator Company pays and upon which they take the risk, demanding of Babb only that he pay as his business warrants and leaving Babb free to place his business where he sees fit, the defendant company counting merely on the probability that Babb will place the great majority of his trades with them, as a mere matter of convenience, under which agreement the defendant does not make Babb its agent and gives him no authority to represent them or act for them, will such an agreement, notwithstanding the intention of the parties, make Babb the agent of the Hammond Elevator Company? Counsel does not contend, certainly in no way shows to the court, that the parties have any subtle reason for making Babb their agent, yet he argues, in effect, that it is legally impossible to transact this business in the way it is being transacted without making Babb the agent. If, from this record, it could in any way be shown why the defendant company should want Babb to be their agent, and that they were seeking, in effect to make him their agent, but not to make him their agent in law, then the court might consider putting aside the express agreement between the parties and all the precautions taken by them against such a conclusion, and finding that Babb is, in fact, the agent of the defendant company, and that the method of doing business between the parties is a mere subterfuge.

Counsel endeavors to meet the incontrovertible fact that these correspondents, if they failed to collect moneys from their customers and the trade results in a loss, must stand the loss, by the assertion that the relation is that of a *del credere* agent, but there is absolutely no evidence to support this contention; and, in the absence of any agreement making the correspondent an agent, the court will not say that the agreement, on its face not one of agency, is one of agency because it might be.

As already stated, we believe that the burden is upon appellant to show jurisdictional facts affirmatively. On the other hand, we believe that the evidence shows affirmatively that the jurisdictional facts did not exist and that the averments on the motion to quash are true. Considering the question, however, from the point of view of the jurisdictional requirements, and independently of the motion to quash, we have called the attention of the court to a number of cases in which the rules of law are applied to various facts appearing in the several cases.

In the case of *St. Clair* v. *Cox,* suit was brought by the plaintiff upon two promissory notes. On the trial, evidence was given by the defendants intending to show that the plaintiff was not a *bona fide* holder of the notes for value, and then a certified copy of a judgment against the payee of the notes, recovered by the defendant in the Circuit Court of Marquette County, Michigan, was offered but excluded on the ground that it did not appear that the Michigan court had obtained jurisdiction of the parties. The judgment in the Circuit Court in Michigan was rendered in an action commenced by attachment. No question was raised as to the validity of the judgment to the extent of the property attached, but it was objected to as evidence that the amount rendered was an existing obligation on or against the com-

pany. The officer serving the writ of attachment returned it, "also served a copy of the writ, etc., on the defendant by delivering the same to Henry J. Colwell, agent of the said Winthrop Mining Company in said county." The Michigan statute provided that in suits commenced by attachment against a foreign corporation, "if a copy of the attachment and of the inventory of the property attached should have been personally served on any officer, principal, clerk or agent of said corporation within the state," personal judgment might be had thereon. The court says in part:

> "It is sufficient to observe that we are of the opinion that, when service is made within the state upon an agent of a foreign corporation, it is essential, in order to support the jurisdiction of the court to render a personal judgment, that it should appear somewhere in the record, either in the application for the writ or accompanying its service, or in the pleadings or findings of the court, that the corporation was engaged in business in the state. The transaction of business by the corporation in the state shown, a certificate of service by the proper officer on the person who is its agent there would be sufficient *prima facie* evidence that the agent represented the company in the business. * * * In the record, a copy of which was offered in evidence in this case, there was nothing to show, so far as we can see, that the Winthrop Mining Company was engaged in business in the state when service was made on Colwell. The return of the officer, on which alone reliance was placed to sustain the jurisdiction of the state court, gave no information on the subject. It did not, therefore, appear, even *prima facie,* that Colwell stood in any such representative character to the company as would justify the service of a copy of the writ on him. The certificate of the sheriff, in the absence of this fact in the record, was insufficient to give the court jurisdiction to render a personal judgment against the foreign corporation. The record was, therefore, properly excluded."

In its opinion in this case, the court, by Mr. Justice Field, discusses at length the history and principles of the doctrine of service of process upon foreign corporations by their local representatives.

St. Clair v. *Cox*, 106 U. S., 350; 27 L. Ed., 222.

In *Goodhope Co.* v. *Railway Barbed Fencing Co.*, the Federal court refused to follow a state statute, on the ground that the state statute was contrary to national justice and the principles of international law, and refused to sustain service upon the president of the defendant company while in the district upon the business of the defendant corporation on the ground that the corporation had never been practically engaged in business within the state, but had only made purchases there which it could have made by correspondence as well as by the presence of its agents.

Goodhope Co. v. *Railway Barbed Fencing Co.*, 22 Fed., 635.

In *St. Louis Wire Mill Co.* v. *Consolidated Barbed Wire Co.*, the court refused to sustain service on the general manager of a Kansas corporation accustomed to purchase raw material either by correspondence or by sending an agent to St. Louis, the general manager having been served while in St. Louis on a pleasure trip. This, although, under the Missouri statute, the service would be sufficient.

St. Louis Wire Mill Co. v. *Consolidated Barbed Wire Co.*, 32 Fed., 802.

A person authorized to solicit passengers for a railway company, but having no authority to sell tickets, even though employed to effect a settlement of the plaintiff's claim, and although he, to that end, made an offer of compromise, is not such an agent that process against his principal can be served upon him.

Maxwell v. *A. T. & S. R. R. Co.*, 34 Fed., 286.

N. K. Fairbanks Co. v. Cincinnati, N. O. & T. R. Ry. Co., 54 Fed., 420.
Wall v. C. & O. R. R. Co., 95 Fed., 398.

In the case of *Evansville Courier Co. v. United Press*, a bill was filed in Indiana against a New York corporation to enjoin it from withholding certain telegraphic news service. The subpoena was served upon the superintendent of the Western Union Telegraph Company, as the agent of the defendant, and upon one Fisher, as agent of the defendant. The defendant company's principal place of business was in New York. It had no office in the State of Indiana, unless it was the local office of the Western Union Telegraph Company, and its only relation with the manager of the Western Union Telegraph Company was that the defendant had leased one or more telegraph wires from the telegraph company for the transmission of news, and the manager of the telegraph company, as such, was charged with the duty of keeping these wires in repair and of seeing that the terms of the contract of lease were mutually performed by the parties. Fisher was an employe of a publishing house in Indianapolis. As to his relations to the defendant, it was his business to look out for news items of general interest in Indianapolis and throughout the state, and if he obtained any of sufficient importance, he sent it over the United Press wire to Chicago, for that purpose delivering his matter to the operator in the office of the telegraph company, by which operator it was put upon the wire of the United Press Company. For such news as Fisher furnished he received three-sevenths of a cent a word. He was free to sell his news to anybody who would buy it. As to Fisher the court says in part:

"No contract existed creating the relation of principal and agent, binding him on the one side to furnish

and the defendant on the other to receive news items. Whether he sent any news items or not was a matter of choice and not of mutual obligation."

The court refused to sustain the service of process on the ground that the defendant company was not doing business within the district, and that the parties served were, neither of them, such agents of the defendant company as that service upon them was service upon the defendant.

Evansville Courier Co. v. *United Press,* 74 Fed., 918.

An agency relation arising merely as a legal result from the facts, although contrary to the avowed intention of the parties, does not create such an agent that the corporation can be held by service upon such agent. In other words, a constructive agency does not create such an agent.

U. S. v. *American Bell Telephone Co.,* 29 Fed., 17, at p. 40.

Doe v. *Springfield Boiler & Mfg. Co.,* 104 Fed., 684.

(4C) The ultimate findings of the Master from the evidentiary facts.

Although not involving the question of service of process upon a foreign corporation, we have cited the court, in this connection to the case of *Municipal Telegraph & Stock Co.* v. *Ward, Collector.* That case involved the liability of the plaintiff, the Municipal Telegraph & Stock Company, to taxation on certain memoranda under Sub-division 3, of Schedule A, of the War Revenue Act of July 13, 1898, as amended by Act of March 2, 1901. The plaintiff was engaged in business as a stock broker, conducting transactions in the purchase and sale of stocks, to be settled with reference to the public market quotations of prices.

"Its business of this character was transacted with numerous brokers who were engaged in business similar to that of the plaintiff, or in conducting bucket shops located in various parts of the country, called 'correspondents,' and the course of the business appears to have been this: Upon the order of one of these correspondents by telegram to buy or sell a specified security if the market quotations warranted the execution of the order, the plaintiff would notify him by telegram that it had bought or sold, as ordered; and on the same day would send him a memorandum such as the statute requires of this and all other purchases or sales made in execution of his orders during the day, and a statement of his debit and credit items in account. When the credit items exceeded the debit items, the plaintiff would send a check to the correspondent for the balance. If the debit items exceeded the credit items, the correspondent would be expected to deposit the balance on the next morning in a designated local bank to the credit of the plaintiff. Each transaction between the plaintiff and the correspondent was identified by a number assigned to it in the consecutive order of the dealings, and this was transcribed in the books of both. These correspondents were at the same time dealing with customers who desired to engage with them in similar contracts or transactions, and their orders to the plaintiff generally represented orders from their own customers to buy or sell securities. Upon receiving notice from the plaintiff that a given order had been filled, the correspondent would notify the customer, and, if the customer had paid to him the required 'margin,' would deliver to him a memorandum such as the statute requires. He would also number this memorandum with the number which had been assigned to the transaction between himself and the plaintiff. The memorandum evidenced a transaction between the correspondent and the customer only. The customer was not named or known in the transaction between the correspondent and the plaintiff; and the memorandum delivered by the plaintiff to the correspondent evidenced

a contract between them only. The commissions charged by the correspondents to their customers were a quarter of 1 per cent on the par value of the securities covered by the contracts or transactions. The commissions charged by the plaintiff to the correspondents were one-half of that amount. The correspondents placed on the memorandums delivered to their customers the stamps required by sub-division 3, and cancelled the stamps. The plaintiff did not stamp the memorandums of sales or purchases sent to its correspondents.

"The tax in controversy was assessed by the defendant upon the transactions between the plaintiff and the correspondents which took place between July 24, 1901, and July 1, 1902. The plaintiff insists that the tax was paid by the stamps affixed by the correspondents upon the memorandums delivered by them to their customers. If this contention is correct, the plaintiff is entitled to recover; otherwise it has no cause of action. If the correspondents were agents of the plaintiff and of their customers, so that in each contract or transaction the plaintiff and the customers were the real principals, it is plain that the contract or transaction is subject to buy one tax. It would be in law a single contract or transaction between the plaintiff and the customer, the correspondent being a mere intermediary, and not a dual one between the plaintiff and its correspondent on the one hand and the correspondent and its customer on the other. The evidence does not warrant this view of the relations between the correspondents, their customers, and the plaintiff. It indicates that the correspondents were principals in their transactions with their customers upon the one hand and with the plaintiff upon the other; that the plaintiff dealt with them as principals, and neither knew nor cared to know any third party in their transactions with them; and that the plaintiff relied exclusively upon the responsibility of the correspondents in its dealings with them, although it was aware of their relations with customers. In a limited sense the correspondents were

agents for the customers, because they were expected to excute orders to enter into contracts of purchase and sale given to them by the customers. In no sense were the correspondents agents of the plaintiff. They stood in no fiduciary relation to the plaintiff. They had no duties to perform for the plaintiff. They were not employed or paid by the plaintiff, their relations were none other than that of principal dealing with principal. When they made a contract to buy or sell with the plaintiff, they were at liberty to treat the contract as their own, and the plaintiff understood that they were at liberty to do so. In paying the tax by stamping the memorandums delivered to their customers the correspondents were merely paying their own tax upon their own tranactions. The facts materially distinguished the case from that in *United States* v. *Clawson* (D. C.), 119 Fed., 994, which is relied upon by the plaintiff.

"The conclusion is that the transactions between the correspondents and the plaintiff were distinct and independent transactions, upon which the plaintiff was required by the statute to pay the tax.

"Judgment is accordingly ordered for the plaintiff."

Municipal Telegraph & Stock Co. v. *Ward, Collector,* 133 Fed., 70, at pp. 71-73.

There is an express contract, or custom of doing business based upon an express understanding between Babb and the Hammond Elevator Company, by which any implication or assumption of agency is expressly provided against, under which Babb and Battle & Dickes have no authority to enter into any binding contract for or on behalf of the Hammond Elevator Company, and under which a course of business is pursued between Babb and Battle & Dickes and the Hammond Elevator Company which is in no particular inconsistent with a relation other than agency. The question before the Master, the question before the trial court, the question before this court, is whether there is affirmative

evidence in this record from which the court can find that the express agreement, the undisputed course of business between these parties, is not evidence of their actual relations, but that they have a secret agreement by which Babb and Battle & Dickes have authority to do something that they never do do and which makes them agents of the defendant company upon whom service of process against the Hammond Elevator Company may be had.

Respectfully submitted.

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